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No. 88-1659

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

THEODORE KANNE and
BEATRIZ KANNE,

Petitioners,

vs.

CONNECTICUT GENERAL
LIFE INS. CO.,

Respondent.

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

1. What are the criteria which establish that an insurance arrangement is an "employee benefit plan" subject to ERISA, under 29 U.S.C. Section 1003, where, as here, there is no formal written plan?[1/]

[1/] It is safe to predict that there will eventually be numerous other petitions filed in this Court raising this issue, in view of the uncertainty surrounding the issue of the circumstances under wich an insurance arrangement constitutes an "employee benefit plan" subject to ERISA. In the instant matter, the insured's direct employer had not established or maintained an employee benefit plan subject to ERISA as defined by 29 U.S.C. Section 1003(a). Such a plan is not established by the activities of a "group or association of employers," pursuant to 29 U.S.C. Section 1002(5), where there is no evidence that the purported employer association in question was, in fact, a group or association of homogeneous, related employers, and no evidence that the insured's direct employer had any voice in the management of the purported employer association in question.

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Amicus Curiae respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

A. OPINIONS BELOW, JURISDICTION, STATUTES AND REGULATIONS INVOVED IN THIS CASE, STATEMENT OF THIS CASE

Amicus Curiae respectfully refers the Court to the petition of petitioners Theodore Kanne and Beatriz Kanne.

I.

DETERMINATION OF THE ELEMENTS NECESSARY TO ESTABLISH THAT AN INSURANCE ARRANGEMENT IS AN "EMPLOYEE BENEFIT PLAN" SUBJECT TO ERISA IS AN ISSUE OF WIDESPREAD IMPORTANCE UPON WHICH THIS COURT HAS NEVER RULED.

In the practice of the Amicus Curiae, it has been noted that insurers are baldly holding themselves out to be ERISA benefit plans and, are not complying, in any respect, with the statutory requirements of such plans.

The courts, and various federal agencies, have long been aware of insurers' desire to hold themselves out as ERISA benefit plans. They have so desired in order to escape the strict laws of the states in which they do business, and to avail themselves of the much less stringent ones provided by the ERISA enforcement scheme. The following is a quote of the 1977 pension task force which stated as follows:

> "It has come to our attention, through the good offices of the national association of State insurance Commissioners that certain entrepreneurs have undertaken to market insurance products to employers and employees at large, claiming these products to be ERISA covered plans. For instance, persons whose primary interest is in profiting from the provision of administrative services are establishing insurance companies and related enterprises. The entrepreneur will then argue that his enterprise is an ERISA benefit plan which is protected,

under ERISA's peremption provision, from state regulation. We are concerned with this type of development, but on the basis of the facts before us, we are of the opinion that these programs are not 'employee benefit plans' as defined in section 3(3). As described to us, these plans are established and maintained by entrepreneurs for the purpose of marketing insurance products or services to others. They are not established or maintained by appropriate parties to confer ERISA jurisdiction, nor is the purpose for their establishment or maintenance appropriate to meet the jurisdictional prerequisites of the act. They are no more ERISA plans than is any other insurance policy sold to an employee benefit plan.

We are mindful of the potentially harmful effects of an overly broad interpretation of the term 'employee benefit plan' when coupled with policy of section 514 which is ERISA's preemption provision. As we have already noted, we do not believe that the statute and legislative history will support the inclusion of what amounts to commercial products within the umbrella of the definition. Where a (plan) is, in effect, an entrepreneurial venture, it

> is outside the policy of section 514...insurance, to be properly characterized as an ERISA employee benefit plan, a plan must satisfy the definitional requirements of section 3(3) in both form and substance."

It should be noted that this report was extensively quoted with approval in the following cases, Private Medical Care Foundation, Inc. v. Califano, at 451 F.Supp. 450, 461 (W.D. Okl. 1977) as well as Hamberlin v. VIP Insurance Trust, at 434 F.Supp. 1196, 1199 (D. Ariz. 1977; Bell v. Employee Sec. Benefit Ass'n, at 437 F.Supp. 382, 392 (D. Kan. 1977); National Business Conference v. Anderson, 451 F.Supp. 458, 461 (S.D. Iowa 1977); Wayne Chemical Inc. v. Columbus Agency Service Corporation, 567 F.2d at 692, 699 (7th Cir. 1977); and, Taggart Corp. v. Life and Health Admin., 617 F.2d at 1208, 1210 (5th Cir. 1980). The above courts mention that, although

the oversight report was not contemporaneous legislative history, it is "virtually inclusive" as to legislative intent. Sioux Tribe v. United States, at 316 U.S. 317, 319 (1942).

There is now great danger that an insurer may baldly hold itself out to be an ERISA benefit plan without substantially complying with the requirements of ERISA pursuant to 29 U.S.C. Section 1003(a). It appears to amicus curiae, based upon personal experience in his law practice in Los Angeles, California, that insurers are, in fact, not complying with the necessary criteria established by 29 U.S.C. Section 1003(a), yet are attempting to avail themselves of the protections afforded by the ERISA enforcement scheme. Such is the case in the within matter, where there is no written employee benefit plan, and no

evidence either that the employer had any intention whatsoever of establishing an employee benefit plan subject to ERISA, or that it made any attempt to comply with the various ERISA regulations governing such plans. As petitioner argues, this Court has never spoken on this particular issue. The case of Fort Halifax Packing Co. v. Coyne, ___ U.S. ___, 107 S.Ct. 2211 (1987) makes it clear that the provisions of ERISA do not apply unless a plan or program has been created. However, it does not address the issue of what elements are necessary to establish the existence of such a plan or program. Certainly, we must not allow insurers to avail themselves of ERISA protection merely by including one page in their benefits booklet calling themselves an ERISA benefit plan, without any further evidence demonstrating compliance

with ERISA requirements.

In order to be an "ERISA employer" under 29 U.S.C. Section 1002(5), an alleged employer group or association must be "a group or association of employers acting for an employer in such capacity." It has been held that an employer association is not an "ERISA employer" under this provision, unless the evidence establishes that the individual employer played a part in management of the employer association. If the employer association fails to show what role the individual employers played in its management, such employer is not covered by ERISA. See Matthew 25 Ministries, Inc. v. Corcoran, 771 F.2d 21 (2nd Cir. 1985); Donovan v. Dillingham, 688 F.2d 1367, FN 11 (11th Cir. 1982). See also Hamberlin v. VIP Ins. Trust, 434 F.Supp. 1196, 1198 (D. Ariz. 1977) (for an employer group to

be an ERISA plan, the employers must have a voice in its management); Baucom v. Pilot Life Ins. Co., 674 F.Supp. 1175, 1181 (M.D. N.C. 1987) (same); Insurance & Prepaid Benefits Trusts v. Marshall, 90 FRD 703 (C.D. Cal. 1981) (an employer group can qualify as an ERISA plan only when such group involves an association of employers, the employers participate in the benefit committee and that committee makes final decisions). See also, Rizzi v. Blue Cross of So. Cal., 206 Cal.App.3d 380, 253 Cal. Rptr. 541 (1988).

Moreover, where an employer group consists of "heterogenous, unrelated employers," ERISA is inapplicable. Credit Managers Ass'n v. Kennesaw Life & Acc. Ins., 809 F.2d 617, 625 (9th Cir. 1987). In the Rizzi case, supra, the California Court of Appeal specifically questioned the instant

Kanne decision because of this rule (206 Cal.App.3d at p. 386, FN 4, 253 Cal.Rptr. at p. 544, FN 4).

Review of this matter is required because the Court of Appeals' holding in the instant case is directly contrary to all of the above authorities. There is no evidence that the employer in this instant case (or, for that matter, any other employer), played any part in the management of ABC, the purported "ERISA employer," and no evidence that ABC was a group of homogeneous, related employers.

Should such a ruling be allowed to stand, it is likely to create precisely the situation which the 1977 Pension Task Force feared when it wrote the cautionary material cited hereinabove, supra.

Further, petitioner addresses the very important question of whether the

"bare purchases of health insurance" may constitute a "plan" subject to ERISA. Taggart Corp. v. Life & Health Benefits Admin., supra, 617 F.2d 1208, 1211, held that there is no ERISA plan under these circumstances. Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982) holds that "bare purchases of health insurance" is evidence of an employee benefit plan governed by ERISA and the issue is one of fact to be decided on a case by case basis (688 F.2d at p. 1373). Donovan specifically disapproves the holding of Taggart Corp., supra, on this subject. (688 F.2d at p. 1375).

In Rizzi v. Blue Cross of So. Cal., supra, the California Court of Appeal noted the confusion and inconsistency among the authorities (206 Cal.App.3d at pp. 384-388, 253 Cal.Rptr. at pp. 543-546), stating that

the various "analytical approaches" the Courts have considered "do not always coincide" (206 Cal.App.3d at p. 389, 253 Cal.Rptr. at p. 547). Therefore, amicus curiae respectfully asserts that clarification in this area is urgently needed and is, as petitioner points out, utterly lacking. For this reason, it is vital that the United States Supreme Court issue a definitive pronouncement of the criteria for determining the existence of an employee benefit plan governed by ERISA under 29 U.S.C. Section 1003(a). Amicus curiae respectfully suggests that this Court adopt stringent criteria, but criteria which may be easily understood and applied.

In order for an insurer to escape stringent state regulation in favor of the relatively minor civil penalties provided

by the ERISA enforcement scheme, it should have fully complied with all of the criteria provided under 29 U.S.C. Section 1003(a).

Further, since, as petitioner points out, there are criminal sanctions which may be imposed upon employers for failure to comply with ERISA requirements under 29 U.S.C. Section 1131, it is additionally advisable that this Court adopt criteria which may be easily understood and applied, since a criminal statute must certainly be plain and unambiguous.

With all the confusion in the current authorities, there is simply no way of knowing with any certainty when ERISA is applicable, and when the duty of compliance with ERISA regulations arises.

In order to avoid future confusion and uncertainty, and resultant chaos in

the State and Federal Court systems, it is necessary that guidance on this subject be provided by the Supreme Court.

CONCLUSION

It is urgently necessary that the State and Federal courts be afforded specific guidance with respect to when the Federal law embodied in ERISA applies to medical and disability insurance arrangements where no written employee benefit plan exists. At the present time, the law practice of amicus curiae is replete with examples of confusion and uncertainty concerning the within issue. All sides to this controversy agree that an authoritative pronouncement from this Honorable Court is necessary to prevent further spread of this deeply troubling confusion and uncertainty.

Respectfully submitted,
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Amicus Curiae